American Bar Association
www.supremecourtpreview.org

No. 08-307

IN THE
Supreme Court of the United States

COMMON LAW SETTLEMENT COUNSEL,

Petitioners,

v.

PEARLIE BAILEY, SHIRLEY MELVIN, GENERAL LEE COLE, ROBERT ALVIN GRIFFIN, VERNON WARNELL, LEE FLETCHER ANTHONY, CHUBB INDEMNITY INSURANCE COMPANY, ASBESTOS PERSONAL INJURY PLAINTIFFS AND CASCINO ASBESTOS CLAIMANTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

RONALD BARLIANT
KATHRYN A. PAMENTER*
KENNETH S. ULRICH
GOLDBERG KOHN BELL BLACK ROSENBLOOM & MORITZ, LTD.
55 East Monroe Street
Suite 3300
Chicago, Illinois 60603
(312) 201-4000

** Counsel of Record*

Attorneys for Petitioners

221728

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

I. The Second Circuit's Interpretation of a Bankruptcy Court's "Jurisdictional Limits" Improperly Excluded Arising Under Jurisdiction. 3

II. The Respondents and Amici Misconstrue the Issues in This Appeal. 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Airadigm Commc'ns, Inc. v. FCC
(In re Airadigm Commc'ns, Inc.),
519 F.3d 640 (7th Cir. 2008) 8

Class Five Nevada Claimants
v. Dow Corning Corp. (In re Dow Corning Corp.),
280 F.3d 648 (6th Cir. 2002) 8

Franchise Tax Board of California v. Hyatt,
538 U.S. 488, 123 S. Ct. 1683,
155 L. Ed. 2d 702 (2003) 9

Kontrick v. Ryan,
540 U.S. 443, 124 S. Ct. 906,
157 L. Ed. 2d 867 (2004) 4

Menard-Sanford v. Mabey
(In re A.H. Robins Co., Inc.),
880 F.2d 694 (4th Cir. 1989) 8

Prou v. United States,
199 F.3d 37 (1st Cir. 1999) 1, 2, 9

Trusted Net Media Holdings, LLC
v. The Morrison Agency, Inc.
(In re Trusted Net Media Holdings, LLC),
550 F.3d 1035 (11th Cir. 2008) 4

TABLE OF AUTHORITIES – CONT'D

Page

TRW Inc. v. Andrews,
534 U.S. 19, 122 S. Ct. 441,
151 L. Ed. 2d 339 (2001) 6

United States v. Wey,
895 F.2d 429 (7th Cir. 1990) 9

Statutes

28 U.S.C. § 157(b)(1) 3, 4

28 U.S.C. § 157(c)(1) 4

28 U.S.C. § 1334 ..... *passim*

Other Authorities

1 *Collier on Bankruptcy*, ¶ 3.01[3]
(15th ed. Rev. 2008) 3

REPLY BRIEF FOR PETITIONERS

The Court has construed the extent of bankruptcy court jurisdiction twice since the passage of the Bankruptcy Reform Act of 1978 (the "1978 Act"). In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982), the Court addressed the constitutionality of the grant of jurisdiction to bankruptcy courts pursuant to the 1978 Act. In *Celotex Corp. v. Edwards*, 514 U.S. 300, 115 S. Ct. 1493, 131 L. Ed. 2d 403 (1995), the Court examined a bankruptcy court's "related to" jurisdiction. This case presents the Court's first opportunity to consider "arising under" jurisdiction in § 1334(b) of the Judicial Code.

In the decision underlying this appeal, the Second Circuit misapprehended the scope of bankruptcy jurisdiction. The Second Circuit ignored a bankruptcy court's core, "arising under" jurisdiction of a confirmation proceeding, focusing instead on the inapplicable prong of "related to" jurisdiction. The Second Circuit also failed to distinguish between a court's *adjudicatory authority* (jurisdiction) and the *standards* that should govern its award or denial of relief (statutory authority). *See*, *e.g.*, *Prou v. United States*, 199 F.3d 37, 45 (1st Cir. 1999) (noting "the unfortunate penchant of judges and legislators to use the term 'jurisdiction' to describe the technically distinct notion of a court's authority to issue a specific type of remedy in a case in which the threshold requirements of subject-matter . . . jurisdiction are not open to question.") The Bankruptcy Court's arising under jurisdiction of the proceeding to confirm the Manville

Plan[1] containing the Injunctions is "not open to question." *Prou*, 199 F.3d at 45. The time for the Second Circuit to express its disagreement with the Bankruptcy Court's exercise of statutory authority in approving the Injunctions in the Manville Plan passed long ago.

Misdirected by the Second Circuit, the Respondents and Amici wholly ignore the issue actually presented by the Common Law Settlement Counsel upon which this Court granted certiorari. (*See* Opening Brief at i.) This case does not require consideration of related to jurisdiction, the Bankruptcy Court's exercise of statutory authority under title 11 or various provisions of the Constitution and the Bankruptcy Code. Rather, arising under jurisdiction governs, the application of which requires the reversal of the Second Circuit's decision.

---

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Brief for the Petitioners Common Law Settlement Counsel filed on January 26, 2009 ("Opening Brief"). All citations herein to "App." refer to the Appendix contained in the Common Law Settlement Counsel's Petition for a Writ of Certiorari filed with this Court on September 4, 2008. As used herein, the term "Respondents" means collectively: (i) Chubb Indemnity Insurance Company ("Chubb") and (ii) Pearlie Bailey, Shirley Melvin, General Lee Cole, Robert Alvin Griffin, Vernon Warnell, Lee Fletcher Anthony, and the Cascino Asbestos Claimants (collectively, the "Objecting Asbestos Claimants"). The term "Amici" means collectively: (i) Jagdeep S. Bhandari, Susan Block-Lieb, Erwin Chemerinsky, Ingrid Hillinger, George W. Kuney, Charles W. Mooney, Jr., Theresa J. Pulley Radwan, Keith Sharfman, Michael D. Sousa, Ettie Ward, and Robert M. Zinman (the "Academic Amici"), and (ii) the Future Claimants Representatives as listed in the Brief *Amici Curiae* of Future Claimants Representatives in Support of None of the Parties. The term "Amici" does not include Resolute Management Inc.

I. The Second Circuit's Interpretation of a Bankruptcy Court's "Jurisdictional Limits" Improperly Excluded Arising Under Jurisdiction.

Section 1334 of title 28 is the only statute that confers bankruptcy jurisdiction. Through referral from the district courts, 28 U.S.C. § 157(a), bankruptcy courts have jurisdiction over all bankruptcy "*cases* under title 11" as well as "*proceedings* arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334 (emphasis added).

> The 'case' referred to in section 1334(a) is the umbrella under which all of the proceedings that follow the filing of a bankruptcy petition take place. . . . From that beginning follow all of the proceedings, whether called controversies, adversary proceedings, contested matters, suits, actions or disputes, that will occur as the case under the Bankruptcy Code unfolds.

1 *Collier on Bankruptcy*, ¶ 3.01[3], at 3-11 (15th ed. Rev. 2008). In this matter, by virtue of the District Court referral, the Bankruptcy Court had jurisdiction over the Manville bankruptcy cases and each proceeding therein.

In further defining bankruptcy court jurisdiction, the inquiry centers on the proceeding. The Judicial Code distinguishes between two types of proceedings — core and non-core. Core proceedings are those "arising under title 11,"[2] which a bankruptcy court may "hear and

---

[2] Core proceedings also include those "arising in a case under title 11." 28 U.S.C. § 157(b)(1). Arising in jurisdiction is not at issue here. (*See* Opening Brief at 14, n.2.)

determine" and then "may enter appropriate orders and judgments." 28 U.S.C. § 157(b)(1). Non-core proceedings are those "related to a case under title 11" which a bankruptcy court may hear, but not determine. 28 U.S.C. § 157(c)(1). Confirmation of a plan of reorganization is expressly listed in 28 U.S.C. § 157(b)(2)(L) as a core proceeding. Accordingly, there is no doubt that every bankruptcy court has core, arising under jurisdiction of a proceeding to confirm a plan of reorganization, including the Manville Bankruptcy Court with respect to the proceeding that resulted in the confirmation of the Manville Plan in 1986.

Without considering a bankruptcy court's core jurisdiction of a proceeding to confirm a plan, the Second Circuit focused on the disputed claims which had been enjoined under the order confirming the plan entered 20 years prior. This analysis confused jurisdiction with statutory authority. Contrary to one of the Respondent's suggestions (Chubb Brief at 42), the distinction between jurisdiction and statutory authority is not merely "semantic." *See*, *e.g.*, *Trusted Net Media Holdings*, *LLC v. The Morrison Agency*, *Inc. (In re Trusted Net Media Holdings*, *LLC)*, 550 F.3d 1035, 1046 (11th Cir. 2008) (determining that the filing requirements of 11 U.S.C. § 303(b) do not "implicate subject matter jurisdiction" and therefore may be waived). Jurisdictional inquiries, in general, may be raised at any time. *Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 915, 157 L. Ed. 2d 867 (2004) (citing *Mansfield*, *C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 4 S. Ct. 510, 28 L. Ed. 462 (1884)). Statutory authority inquiries, though, must be raised within prescribed time limits. When that time limit expires, the bankruptcy court's decision becomes final.

Here, the Bankruptcy Court decided in 1986 and reiterated in 2004 that title 11 permitted the inclusion of, among other provisions, the Injunctions within the Manville Plan. Whether the Bankruptcy Code (title 11) authorizes a bankruptcy court to include particular provisions within a proposed plan is solely a question of a bankruptcy court's statutory authority. The Second Circuit in 2008 improperly characterized as jurisdictional the inquiry of whether the Bankruptcy Court acted properly in approving the Injunctions as part of the Manville Plan.[3] Because the Bankruptcy Court's decision long ago became final, the Second Circuit's judgment must be reversed.

---

[3] A bankruptcy court's power is not without limits. For example, consideration of third party claims necessitates a different jurisdictional discussion than the approval of an injunction in a plan of reorganization enjoining such a claim. The former requires a decision on the merits of the claim; whereas, the latter requires a bankruptcy court to decide whether the Bankruptcy Code authorizes the injunction as part of the plan. Similarly, title 11 limits a bankruptcy court's exercise of statutory authority. For example, in the case of non-debtor, third party injunction and release provisions in plans of reorganization, Circuit Courts of Appeal have established different standards for their approval. In several instances, the application of these standards has precluded the inclusion of certain such provisions in plans of reorganization. (*See* Opening Brief at 19-23.)

II. The Respondents and Amici Misconstrue the Issues in This Appeal.

The Respondents[4] and Amici disregard the question presented by the Common Law Settlement Counsel concerning arising under jurisdiction and ignore the need to maintain the distinction between jurisdiction and statutory authority. Their nearly 150 pages of briefing concern related to jurisdiction, the Bankruptcy Court's exercise of statutory authority, and various provisions of the Constitution and the Bankruptcy Code, none of which are before this Court.

"It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001)). In contravention of this principle, the Respondents and Amici seek to write "arising under title 11" out of the statute, 28 U.S.C. § 1334. The Respondents and Amici incorrectly raise the inapplicable law concerning related to jurisdiction only to make arguments against its

---

[4] Contrary to the Objecting Asbestos Claimant's unsupported contention, all claimants asserting common law claims, regardless of whether a suit has yet been filed, are eligible to receive compensation from the $70 million settlement fund. (App. 150a at ¶ 101.) The procedures for distributing those funds have not yet been considered by the Bankruptcy Court, and thus are not before this Court.

application.[5] By focusing on related to jurisdiction, they effectively concede the argument that the Bankruptcy Court had core, arising under jurisdiction of the proceeding to confirm the Manville Plan.

The Respondents and the Academic Amici also wish that this Court scrutinize the Bankruptcy Court's exercise of statutory authority in 1986 in approving the Injunctions in the Manville Plan. Specifically, Chubb states its first question presented as "[w]hether bankruptcy courts have the statutory authority to enjoin" certain "state-law claims." (Chubb Brief at (i).) The Objecting Asbestos Claimants similarly confuse jurisdiction and statutory authority with their citation to, among others, *Wilmot v. Mudge*, 103 U.S. 217 (1880), which concerned whether a debtor was entitled to a discharge, a statutory authority inquiry. (Objecting Asbestos Claimants' Brief at 45-46.)

Questions regarding the Bankruptcy Court's exercise of statutory authority in 1986 are not before this Court. As with all title 11 issues, the time to review the merits of a bankruptcy court's final order is limited.

---

[5] The Second Circuit recognized that "[i]t is undisputed that the bankruptcy court had continuing jurisdiction to interpret and enforce its own 1986 orders." (App. 15a.) Contrary to the Respondents' contention that the 2004 Clarifying Order is at issue here, the Second Circuit's jurisdictional inquiry focused on the Bankruptcy Court's 1986 Orders, and whether the Bankruptcy Court possessed jurisdiction in 1986 to enjoin the Direct Actions. (*See*, *e.g.*, App. 29a ("[h]owever, the 1986 orders must be read to conform with the bankruptcy court's jurisdiction over the res of the Manville estate.")

In this case, the time to review the Bankruptcy Court's confirmation of the Manville Plan and its approval of the Injunctions in that plan passed 20 years ago. Contrary to the Respondent's contention, the Common Law Settlement Counsel cited to statutory authority case law[6] to show that the Circuit Courts have adequately established standards for a Bankruptcy Court's approval of an injunction in a plan pursuant to 11 U.S.C. §§ 105 and 1123(b)(6). Those standards limit the non-debtor, third party injunctive relief that may be included in a plan of reorganization and thereby adequately address the Second Circuit's unwarranted concern of abuse in granting such relief.

Additionally, the Respondents' and Amici's discussion of § 524(g) of the Bankruptcy Code is equally unnecessary to a consideration of the controlling jurisdictional issue here. The Bankruptcy Court based its rulings in 1986 on the Bankruptcy Code as it then existed. Whether the Injunctions conform to a provision of title 11 is an issue of statutory authority, not jurisdiction, and thus is not relevant to the question that the Common Law Settlement Counsel presented to this Court.

---

[6] *E.g.*, *Class Five Nevada Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 656-57 (6th Cir.), *cert. denied*, 537 U.S. 816, 123 S. Ct. 85, 154 L. Ed. 2d 21 (2002), *Menard-Sanford v. Mabey (In re A.H. Robins Co., Inc.)*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959, 110 S. Ct. 376, 107 L. Ed. 2d 362 (1989) and *Airadigm Commc'ns*, *Inc. v. FCC (In re Airadigm Commc'ns*, *Inc.)*, 519 F.3d 640, 657-58 (7th Cir. 2008); *see also* Opening Brief at 19-23.

Finally, the Academic Amici raise a series of constitutional questions that go to the enforceability of the Injunctions, not the Bankruptcy Court's jurisdiction to confirm the Manville Plan that contained the Injunctions. Such questions are not relevant to the jurisdictional issue before this Court. In fact, "[o]nce subject-matter jurisdiction has properly attached, courts may exceed their authority or otherwise err without loss of jurisdiction." *Prou*, 199 F.3d at 45; *see also United States v. Wey*, 895 F.2d 429, 431 (7th Cir.) ("[c]ourts may err, even offend against the Constitution, without losing subject-matter jurisdiction"), *cert. denied*, 497 U.S. 1029, 110 S. Ct. 3283, 111 L. Ed. 2d 792 (1990). Moreover, the Respondents did not raise such questions in the courts below and, as such, they are not properly before this Court. *See Franchise Tax Board of California v. Hyatt*, 538 U.S. 488, 497, 123 S. Ct. 1683, 1689, 155 L. Ed. 2d 702 (2003) (this Court declined the amici's request to reconsider an earlier Constitutional ruling not raised by the petitioner) (citing Sup. Ct. R. 14.1(a); *Mazer v. Stein*, 347 U.S. 201, 206 n.5, 74 S. Ct. 460, 98 L. Ed. 630 (1954) ("[w]e do not reach for constitutional questions not raised by the parties.")).

The Respondents and Amici offer no response to the question presented by the Common Law Settlement Counsel. In the 1986 Orders, the Bankruptcy Court properly invoked its core, arising under jurisdiction of the proceeding to confirm the Manville Plan and exercised its statutory authority under title 11 to approve the Injunctions in the plan. The 1986 Orders are final and should be enforced.

CONCLUSION

For the reasons set forth in the Brief for the Petitioners Common Law Settlement Counsel filed on January 26, 2009 and this Reply Brief, the judgment of the Second Circuit should be reversed, and the case remanded for further appellate proceedings in that court.

Respectfully submitted,

RONALD BARLIANT
KATHRYN A. PAMENTER*
KENNETH S. ULRICH
GOLDBERG KOHN BELL BLACK
ROSENBLOOM & MORITZ, LTD.
55 East Monroe Street
Suite 3300
Chicago, Illinois 60603
(312) 201-4000

Attorneys for Petitioners

* *Counsel of Record*